



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JS v Minister of Employment and Social Development*, 2020 SST 962

Tribunal File Number: GP-19-1108

BETWEEN:

J. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Claimant represented by: Melanie Gardin

Videoconference hearing on: September 14, 2020

Date of decision: September 16, 2020

DECISION

[1] The Claimant, J. S., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start March 2017. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant was 33 years old when she was involved in a car accident in September 2015. She suffered injuries including a mild brain injury, headaches, visual disturbances, dizziness, fatigue and shoulder and neck pain. The Claimant applied for a CPP disability pension on February 27, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because the evidence did not show any severe pathology or impairment, which would have prevented her from performing suitable work within her functional limitations. The Claimant appealed to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[3] For the Claimant to succeed, she must prove that she has a disability that was severe and prolonged by December 31, 2017. This date is based on her contributions to the CPP.¹

[4] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.²

THE REASONS FOR MY DECISION

[5] I find that the Claimant has a severe and prolonged disability as of September 2015. I reached this decision by considering the following issues.

¹ The *CPP* calls this date the “Minimum Qualifying Period.” See s. 44(2).

² The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove they are disabled on a balance of probabilities. In other words, they must show it is more likely than not that they are disabled.

REASONS WHY I FIND THE CLAIMANT'S DISABILITY IS SEVERE

The Claimant has functional limitations that affect her capacity to work

[6] My decision about whether the Claimant's disability is severe is not based on her diagnosis. It is based on whether she has functional limitations that prevent her from working.³ I have to look at her overall medical condition and think about how the Claimant's health issues might affect her ability to work.⁴

[7] The Claimant has to provide objective medical evidence of her disability as of December 31, 2017. If the Claimant fails to prove that she suffered from a severe disability prior to this date, medical evidence dated after is irrelevant.⁵

[8] The Claimant argues that she is unable to work because of the effect of her conditions collectively. She said her concussion/closed head injury affects her ability to concentrate, focus and memory. She relies on her daughters to remind her of appointments and other things such as household tasks. She told me she has a headache every day, which causes her to feel dizzy and have difficulty speaking. She also suffers from a visual disturbance. She explained that it was as if her horizontal line had shifted. Her vision is blurry and her depth perception is "off". She provided an example of how she cannot walk her daughters to school if it is snowing. The brightness of the snow and the falling motion make her nauseous. The Claimant said she also suffers from fatigue and neck, shoulder, and back pain. This pain is constant. She is limited to doing any small task for a short period. The Claimant testified that these conditions and their effect on her have remained the same from September 2015 to the present day.

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁵ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and *Canada Pension Plan Regulations*

[9] The medical evidence from Dr. Dawud supports the Claimant's statements. At the time of the Claimant's MQP, he said she continued to suffer from a head injury. This injury resulted in chronic headaches, dizziness, cognitive impairment, visual disturbance and balance deficits. She also suffered from chronic pain in her neck, shoulders and low back.⁶ Dr. Dawud also noted that the Claimant was slow to respond to treatment and was unable to complete tasks. He said that although her progress was slow, she had shown some improvements. Her cognitive deficits continued to be slow to improve, although her balance had shown some improvement. Despite these minimal improvements, Dr. Dawud was uncertain if the Claimant would have enough improvement to complete tasks. I am mindful that this information described the Claimant's conditions and limitations almost two years after the Claimant's accident. After two years of numerous continuous treatments, there was still only minimal improvement and not enough improvement that would allow her to return to work. Further, after two years, it was still unknown if the Claimant would ever regain enough capacity to return to work.

[10] I also considered the evidence of Dr. Adekoya (pain management). He examined the Claimant at the time of her MQP.⁷ He noted that the Claimant had low back and neck pain and headaches since her car accident in 2015. It was Dr. Adekoya's opinion that the Claimant had mechanical neck and back pain with central neuropathic syndrome as well as myofascial pain syndrome and post-concussive headaches. This report supports the findings of Dr. Dawud.

[11] Dr. Franklyn (psychologist) agreed with Dr. Dawud that as of August 2017, the Claimant was unable to return to her work as the RAI Co-ordinator at Country Village Homes and she was unable to return to any other comparable position. Dr. Franklyn said that the Claimant continued to have difficulty with attention, concentration and short-term memory. She also had mental fatigue, which was very limiting. She

⁶ Dr. Dawud's report is at GD 2-474.

⁷ Dr. Adekoya's report of January 4, 2018 is at GD 2-148.

explained that the Claimant could not maintain persistence or pace to complete a task. She said that the Claimant's cognitive and emotional issues affect her daily life.⁸

[12] Alisha Worotny (occupational therapist) agreed with both Dr. Dawud and Dr. Franklyn that the Claimant was unable to return to work as a nurse. However, the test before me is not whether the Claimant can return to her previous job. I must decide if she has capacity for any type of suitable work. When I considered the functional limitations outlined by the occupational therapist, I agree that she would be unable to return to her work as a nurse, and find that she would also not be able to return to any other type of work. The Claimant continued to have cognitive difficulties, including issues with multi-tasking, attending to details and functioning within a busy, loud environment. She also struggled with time management. She experienced consistent nausea and headaches following engagement in simple cooking tasks in a loud environment within her home. She also struggled with light sensitivity, and her interaction on computerized devices was limited because of symptom exacerbations following computer task engagement. The Claimant's balance also continued to be affected, especially climbing stairs. She further experienced ongoing pain and positional intolerances, including reduced sitting, standing, and walking tolerances. The Claimant also continued to experience fatigue following typical daily task engagement, and experienced exhaustion, increased headaches, nausea, and dizziness, at times of exertion. Based on these functional limitations, I am hard pressed to think of any type of employment for which the Claimant would have capacity.

[13] Dr. Harnadek (neuropsychologist) examined the Claimant around her MQP in November 2017.⁹ Dr. Harnadek conducted extensive testing and concluded that the neuropsychological diagnosis was mild impairment of visual processing speed, nonverbal conceptual-reasoning and right-hand speeded dexterity. He said the Claimant met a DSM-V diagnosis of unspecified mild neurocognitive disorder. His prognosis that the Claimant would make further neuropsychological recovery was guarded. He said

⁸ Dr. Franklyn's report is at GD 2-387.

⁹ Dr. Harnadek's report is at GD 2-439.

there was also the potential for the Claimant's neuropsychological functioning to worsen if her pain and/or psychological functioning deteriorated.

[14] Dr. FitzGerald (vocational rehabilitation specialist) assessed the Claimant in March 2019.¹⁰ Although this is more than a year after her MQP, the Claimant's symptoms remain unchanged as noted by Dr. Dawud's evidence and the Claimant's testimony.

[15] Dr. FitzGerald noted the Claimant needed accommodations to perform the testing, which included using earplugs and sunglasses. She was also unable to complete more than a few minutes of a test due to her reported symptoms flaring up causing her to be unable to focus and read. It was Dr. FitzGerald's opinion that in March 2019, the Claimant was not competitively employable even on a part-time basis because of her vocational deficits. He expected this to continue until her visual handicaps were addressed.

[16] I also considered Dr. Sangha's report of February 2020.¹¹ I recognize that this report was conducted more than two years after the Claimant's MQP. However, Dr. Sangha provides his opinions based on the injuries and functional limitations of the Claimant related to her September 2015 accident, which are the same today. Further, it supports that the Claimant's conditions are prolonged.

[17] Dr. Sangha said on the basis of his assessment and the provided medical information, the September 2015 accident impairments were:

- Mild traumatic brain injury with ongoing post-concussive syndrome.
- Cervical strain with mid-cervical facet-mediated pain and dysfunction, with superimposed
- myofascial impairment with features of central sensitization.
- Chronic myofascial pain of the thoracolumbar and gluteal region with features of central
- sensitization
- Disordered sleep.
- Chronic pain syndrome.

¹⁰ Dr. FitzGerald's report begins at GD 1-9.

¹¹ Dr. Sangha's report is at GD 5.

- Psychoemotional distress.
- Cognitive impairment with objective evidence of neurocognitive dysfunction on neuropsychological assessment.

[18] Dr. Sangha's opinion was that the overall prognosis should be considered guarded and more likely poor. The likelihood of resolution of her symptoms at this late date was negligible. He felt she would have persistent symptomatology and was at risk for exacerbations.¹² Dr. Sangha believed the Claimant had reached maximum medical recovery because of the September 2015 accident.

[19] The opinions of the numerous specialists identified above, all confirm the Claimant's description of her symptoms at the time of her MQP as well as her functional limitations. The medical evidence shows that the Claimant had functional limitations that affected her ability to work by December 31, 2017. The evidence of the doctors is that the Claimant does not have capacity for work.

The Claimant does not have work capacity

[20] When I am deciding if the Claimant is able to work, I must consider more than just the Claimant's medical conditions and their effect on functionality. I must also consider her age, level of education, language proficiency, and past work and life experience. These factors help me decide if the Claimant can work in the real world.¹³

[21] The Claimant was only 35 years old in December 2017. She would have many years of potential employment before the standard age of retirement. She also has transferable skills from her employment history. These include computer skills, university courses and an RPN (registered practical nurse) certificate. Despite advantages in age, education and transferable skills, her medical condition would not allow her to be a reliable employee or candidate to retrain. She is unable to use a computer, has cognitive limitations including only doing one task for a few minutes and the need for a quiet and dimly lit setting. Further, the Claimant would not be a

¹² Dr. Sangha's opinion is at GD 5-46.

¹³ The Federal Court of Appeal held that the severe part of the test for disability must be assessed in the real world context (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

predictable employee for a real world employer. This is evidenced by her volunteer work.

[22] The Claimant said that she wanted to try to volunteer against the advice of her physicians. She arranged in 2017 to volunteer twice a week at her daughters' school in the library. She would take books from the library and put them on the shelf in the kindergarten room. She did this before school started when there were few people in the building. She said that she could not put the books in alphabetical order because of her cognitive limitations. She simply put them on the shelf. The Claimant told me that the first day she could only volunteer 15 minutes because of pain, headaches, vision difficulties and her cognitive limitations. She said that by 2018 she was able to volunteer 45 minutes before her symptoms forced her to stop.

[23] The Claimant also tried volunteering in a setting with which she was familiar – a medical clinic. She said that she went once a week, but was not able to manage more than 45 minutes. She said she needed to use her sunglasses because of the lights. She tried to type on a computer, but she could not look at the screen without an exacerbation of her symptoms. She was also unable to put away charts without pain in her arm and shoulder. She said that most days her supervisor sent her home.

[24] I find that despite her personal attributes, the Claimant is unable to work in any capacity because of her medical condition. Therefore, I find that in the “real world” it is unlikely that the Claimant is capable of maintaining employment. The Claimant testified that her physiotherapist said she would need to be able to volunteer for 2 hours, 2 days a week before she could be considered for a return to work program. Unfortunately, the Claimant has not been able to volunteer for more than 45 minutes before her symptoms force her to stop. I find that the Claimant's efforts to volunteer show that she is incapable of regularly pursuing any gainful work.

The Claimant has made reasonable efforts to follow recommended treatments

[25] The Claimant has made reasonable efforts.¹⁴ She has consulted with numerous specialists, had nerve block injections, had physiotherapy treatment, is using numerous medications and has followed all advice given to her by her physicians. Many of these treatments have been ongoing since 2015 and continue today. However, these treatments have not improved the Claimant's functionality enough to provide her with work capacity.

REASONS WHY I FIND THE CLAIMANT'S DISABILITY IS PROLONGED

[26] The Claimant's disability is prolonged. A disability is prolonged if it goes on for a long period of time and looks like it will continue indefinitely, or will result in the person dying.¹⁵

[27] I do not find any evidence that would reasonably lead me to assume that the Claimant's condition will be resolving in the foreseeable future. The Claimant continues to suffer from the same conditions she had immediately following her accident in September 2015 including cognitive impairments, headaches and back, neck and arm pain.

[28] Despite numerous treatments, her function has not improved enough to allow her to return to any gainful employment. There is no suggestion from her family doctor or any of the numerous specialists she has consulted with, that she has capacity to return to work.

[29] The neuropsychologist's prognosis at the time of the Claimant's MQP was guarded that the Claimant would make any further neuropsychological recovery and in fact it may worsen. More than two years later in February 2020, Dr. Sangha's overall prognosis was guarded and more likely poor. He believed that the Claimant had reached maximum medical recovery.

¹⁴ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

¹⁵ This requirement is found at Section 54(2)(a)(ii) of the CPP

[30] This indicates to me that her condition will continue indefinitely. I conclude that her disability is prolonged, as well as severe.

CONCLUSION

[31] The Claimant had a severe and prolonged disability in September 2015. However, the CPP says she cannot be deemed disabled more than fifteen months before the Minister received her disability application. After that, there is a four-month waiting period before payment begins. The Minister received the Claimant's application in February 2018. That means she is deemed to have become disabled in November 2016. Payment of her pension starts as of March 2017.

Connie Dyck
Member, General Division – Income Security